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**St. Francis Medical Center, Catholic HealthCare West, Southern California Region and Service Employees International Union, Local 399, AFL-CIO.** Cases 21-CA-32642, 21-CA-32702, 21-CA-32754, 21-CA-32759, 21-CA-32760, 21-CA-32772, 21-CA-32775, 21-CA-32833, 21-CA-32841, and 21-CA-33082

December 31, 2003

## DECISION, ORDER, AND ORDER REMANDING

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 15, 2000, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order, as modified and set forth in full below.<sup>2</sup>

The judge found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. With the exception of one 8(a)(3) allegation discussed below, we affirm the judge's findings and conclusions.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's failure to rule on its motion to dismiss the allegation in complaint par. 8(q) of an unlawful interrogation of employee Betelho by Respondent's agent Stahl. We find it unnecessary to pass on this exception because a finding of unlawful interrogation for this incident would be cumulative of the other unlawful interrogations we have found, and thus would not affect the remedy.

Further, although the judge referred to the allegation that Supervisor Barnes unlawfully interrogated employee Forrest on or about June 19, 1998, she made no finding regarding this allegation. In any event, such a finding would be cumulative and therefore would not affect the remedy.

<sup>2</sup> We will modify the judge's recommended Order to conform more closely with the findings herein. Specifically, we have added a remedy to reflect the judge's finding that the Respondent unlawfully solicited and promised to remedy grievances.

<sup>3</sup> Member Schaumber notes that the Respondent relies solely on a challenge to the judge's credibility resolution in its exceptions to the finding of an 8(a)(1) impression of surveillance violation by Director of

The judge found that the Respondent violated Section 8(a)(3) by counseling technical radiologist Carmen Bautista for giving a copy of the Union's employee survey to Ultrasound Technician Dominick Saati.<sup>4</sup> The judge did not, however, specifically resolve the factual issue of whether Saati was with a patient when Bautista gave him the survey and/or whether Bautista disturbed Saati's delivery of patient care. Without a specific factual finding on this matter, we are unable to review the judge's ultimate determination under *Wright Line*<sup>5</sup> that protected union activity, rather than unprotected interference with Saati's work, motivated Respondent's disciplinary action.

In our view, a factual finding as to whether Bautista interrupted and/or disturbed Saati's delivery of care to the patient when she allegedly gave him the survey is essential to determining whether the Respondent lawfully counseled Bautista about this incident. See generally *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 504 (1978) (a hospital has an important interest in providing a tranquil environment for patient care). Accordingly, we remand this allegation to the judge for a supplemental decision resolving the issue whether Bautista interfered with Saati's delivery of care to a patient at the time she gave him the survey, and to determine the impact of this resolution on the judge's prior findings and conclusions with respect to the allegation of an unlawful counseling.<sup>6</sup> It is not necessary to reopen the record to resolve this issue on remand.<sup>7</sup>

Emergency and Trauma Services Barnes in a December 1997 conversation with employee Plaza. The judge credited Plaza's version of this conversation and discredited Barnes' denial that she told Plaza she knew who attended a union meeting. The Respondent does not contend that Plaza's testimony, if credited, fails to prove the alleged violation. In light of the limited nature of the exceptions and absent any basis for reversing the judge's credibility resolution, Member Schaumber agrees to affirm the judge's finding of a violation.

<sup>4</sup> See sec. III, D, 1, a of the judge's decision. All dates refer to 1998 unless otherwise noted.

<sup>5</sup> *Wright Line*, 251 NLRB 1083, enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>6</sup> The judge also found that the Respondent violated Sec. 8(a)(1) by disparately enforcing its no-solicitation, no-distribution rule while counseling Bautista regarding the above-described incident with Saati. See sec. III, E, 1 ("allegation regarding Debra Bernardi") of the judge's decision. We find no need to reach the disparate enforcement issue for this counseling because the finding of a violation would be cumulative of other violations of this type found by the judge and affirmed in this Decision.

<sup>7</sup> With a final decision on the counseling 8(a)(3) allegation held in abeyance pending issuance of the judge's supplemental decision and order, we will delete references to this matter from the judge's conclusions of law which we affirm today and from the remedial provisions we adopt. The portions of the judge's conclusions of law, remedy, and order relating to the unlawful *warning* issued to Bautista in April are not affected by our remand.

## AMENDED CONCLUSION OF LAW

"1. By counseling Victor Rios and Caroline Plaza and by warning Carmen Bautista and Jaime Duarte because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act."

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, St. Francis Medical Center, Catholic Healthcare West, Southern California Region, Lynwood, California, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Counseling or warning employees because they assisted the Union and engaged in concerted activities in order to discourage them from engaging in these activities.

(b) Enforcing its no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics.

(c) Interrogating employees about their union or protected, concerted activities.

(d) Creating the impression of surveillance by informing employees that it knew who had attended union meetings.

(e) Telling employees that they would be discharged if there were a strike.

(f) Threatening employees with an unspecified reprisal for engaging in union activity.

(g) Soliciting grievances and implicitly promising to remedy those grievances in order to discourage employees from seeking union representation.

(h) Requesting employees to report lawful and permissible union activity to it.

(i) Demanding that employees surrender union literature to it.

(j) Falsely accusing union supporters of damaging its property and threatening them with unspecified reprisals.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful counseling of Victor Rios and Caroline Plaza and the unlaw-

ful warnings to Carmen Bautista and Jaime Duarte, and within 3 days thereafter notify the employees in writing that this has been done and that the counselings and warnings will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Lynwood, California copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since December 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation in the amended complaint that the Respondent violated Section 8(a)(3) and (1) by counseling Carmen Bautista in March 1998 for distributing a survey to Dominick Bautista is hereby severed and remanded to Administrative Law Judge Mary Miller Cracraft for further proceedings consistent with this Decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate, with respect to the issue on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

Dated, Washington, D.C. December 31, 2003

Wilma B. Liebman,	Member
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT counsel you, warn you, or otherwise discriminate against any of you for supporting Service Employees International Union, Local 399, AFL-CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT enforce our no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions while not enforcing the rule against nonunion solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics during working time.

WE WILL NOT create the impression that we are surveilling your union activities by telling employees that we know who attended union meetings.

WE WILL NOT tell you that you will be discharged if there were a strike.

WE WILL NOT threaten you with an unspecified reprisal for engaging in union activity.

WE WILL NOT solicit grievances and implicitly promise to remedy those grievances in order to discourage you from seeking union representation.

WE WILL NOT request that you report lawful and permissible union activity to us.

WE WILL NOT demand that you surrender union literature to us.

WE WILL NOT falsely accuse union supporters of damaging our property and threaten them with unspecified reprisals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful counselings and warnings of Carmen Bautista, Victor Rios, Jaime Duarte, and Caroline Plaza, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the counselings and warnings will not be used against them in any way.

ST. FRANCIS MEDICAL CENTER, CATHOLIC HEALTHCARE WEST, SOUTHERN CALIFORNIA REGION

*Ann L. Weinman, Esq., and Dean Yanohira, Esq., for the General Counsel.*

*Mary Donlevy, Esq. and Scott Davidson, Esq. (O'Melveny & Myers), of Los Angeles, California, for the Respondent.*

*Ellen Greenstone, Esq. and Andrew L. Strom, Esq., of Los Angeles, California, for the Charging Party.*

#### DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. This case opened on October 12, 1999, in Los Angeles, California. The hearing closed on May 31, 2000. The amended consolidated complaint, as further amended at hearing, alleges that St. Francis Medical Center, an operating division of Catholic Healthcare West, Southern California Region (Respondent), issued disciplinary warnings to employees because of their activities on behalf of Service Employees International Union, Local 399, AFL-CIO (the Union) in violation of Section 8(a)(1) and (3) of the Act and committed various independent violations of Section 8(a)(1) of the Act. Specifically, it is alleged that Respondent maintained a no-solicitation, no distribution rule which was selectively and disparately enforced; interrogated employees about their union activities; created the impression of surveillance; told an employee that she would be discharged if there were a strike; solicited grievances in order to dissuade an employee from supporting the Union; threatened an employee with unspecified reprisals; requested employees to report lawful and permissible union activity to it; demanded that employees surrender union literature to it; and falsely ac-

cused a union supporter of damaging its property because of the employee's union activity.<sup>1</sup>

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,<sup>2</sup> and after considering the briefs filed by all counsel, I make the following

#### FINDINGS OF FACT

##### JURISDICTION

Respondent is a California corporation which owns and operates a hospital and health care facility located in Lynwood, California. During the 12-month period ending December 31, 1997, a representative period, Respondent derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$50,000 which were shipped directly to its Lynwood, California facility by suppliers located outside the State of California. Respondent admits and I find that it is a an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

##### II. LABOR ORGANIZATION STATUS

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. UNFAIR LABOR PRACTICES

###### A. Background

In July and August 1997, the Union began a wall-to-wall organizing campaign covering all nonprofessional employees and all professional employees except nurses, who were already represented by another union. There were approximately 1000 employees in the targeted categories. Throughout the fall and winter of 1997, the Union's efforts included small group meetings at employees' homes. On February 9, 1998, the Union announced a survey to determine employee concerns. The sur-

vey was distributed by employees in the cafeteria and in non-work areas of the hospital throughout the remainder of February. In March 1998, the union president visited Respondent's cafeteria during lunch time and employees met with him to discuss unionization. Thereafter, employees distributed leaflets about the Union on the emergency room side of the building in front of the entrance way, between the hospital and the parking structure, and in the parking lot stairways.

In response, Respondent's president Gerald T. Kozai, issued "Straight Talk," a newsletter devoted to issues in the Union's campaign, setting forth Respondent's position on certain issues in the campaign. For instance, the newsletter opined that signing a union card was neither in the employees' nor the Medical Center's best interest. Another newsletter presented the Union as interested only in obtaining money from employees. It urged employees not to be swayed by union promises. A letter dated May 12, 1998, from Director, Human Resources Debra Bernardi, labeled the Union's solicitation of employees in Respondent's cafeteria while having lunch as "unethical" and urged employees to show respect during lunch.<sup>3</sup>

On May 14, 1998, "Straight Talk" continued with a recitation of Respondent's wage and benefit package noting, "*Your benefits should not be taken lightly or for granted!*" This newsletter concluded,

Should a union become the exclusive bargaining agent for associates here, *the above benefits could all be at risk*. Don't be misled by campaign promises. Neither the law nor the union can guarantee that wages and benefits that you now have will either be maintained or improved. They would be subject to bargaining, and no one can predict the outcome.

The union can make promises, but they can't guarantee you anything!

Other newsletters instructed employees about the appropriate method of rescinding their authorization cards or removing their names from "the list," noted lack of support for a strike called by a sister local of the Union, set forth Respondent's position on Union promises by comparing these promises to contracts at other hospitals, and characterized payment of Union dues with a picture of a toilet and the caption: "Have you ever watched your money go down the drain?" A newsletter dated March 30, 1998, advised employees, "If you have any questions, or want to report a questionable incident involving union organizers, talk to your supervisor or other member of the management team." On May 4, 1998, a newsletter advised employees,

This same law gives you, the Associate who does not support the Union, EQUAL RIGHTS! You are protected from those who would harass, coerce, intimidate or any way attempt to

<sup>1</sup> The underlying charges were filed by the Union against Respondent as follows: the charge in Case 21-CA-32642 was filed on March 26, 1998; the charge and amended charge in Case 21-CA-32702 were filed on April 29 and June 5, 1998, respectively; the charge and amended charge in Case 21-CA-32754 were filed on May 18, and August 13, 1998; the charge and amended charge in Case 21-CA-32759 were filed on May 21 and September 9, 1998; the charge and amended charge in Case 21-CA-32760 were filed on May 21 and September 9, 1998; the charge in Case 21-CA-32772 was filed on May 26, 1998; the charge and amended charge in Case 21-CA-32775 were filed on May 27 and August 26, 1998, respectively; the charge in Case 21-CA-32833 was filed on July 1, 1998; the charge in Case 21-CA-32841 was filed on July 7, 1998; and the charge and amended charge in Case 21-CA-33082 were filed on December 3, 1998, and February 9, 1999, respectively.

<sup>2</sup> Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

<sup>3</sup> In addition to Kozai and Bernardi, Respondent admits that the following individuals are supervisors within the meaning of Sec. 2(11) and agents within the meaning of Sec. 2(13) of the Act: Hub Freeman, Assistant Administrator, Patient Care Services; Donna Bode, Director of Diagnostic Imaging and Radiation Therapy; Nicola Barnes, Director of Emergency and Trauma Services; Monica Hunter, Manager, Admissions; Robert Herthel, Bio-Medical Supervisor; Larry Stahl, Assistant Administrator, Ancillary Services; and Michael Tierno, Director, Nutrition Services.

force you to accept their way of thinking. It is your right to decide! The law and the Medical Center are on your side. Don't let them disturb you or your patients. You have the right to let them know your decision!

If anyone should interfere with your rights, please advise your supervisor immediately.

#### *B. No-Solicitation, No-Distribution Rule*

At all material times, Respondent's employee manual has contained the following rule:<sup>4</sup>

Associates of the Medical Center may not solicit during working time for any purpose.

Associates of the Medical Center may not solicit at any time for any purpose, in immediate patient care areas, such as patient rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas, or in any other area that would cause disruption of health care operations or disturbance of patients.

Associates may not distribute literature during working time, for any purpose. Working time is defined in paragraph C.

Associates may not distribute literature at any time, for any purpose, in working areas. Working areas are all areas in the Medical Center except cafeteria, gift shop, associate lounges, lobbies, and patient parking areas.

Working time,

includes the working time of both the associate doing the soliciting or distributing and the associate to whom the soliciting or distributing is being directed. Working time does not include break periods, meal times or any other specified periods, if any, during the work day when associates are properly not engaged in performing their work tasks.

#### *C. Solicitation and Distribution Practices*

Debra Bernardi, Director Human Resources, explained that the no-solicitation policy was designed to avoid disruption of patient care. She said that the policy does not prohibit employees from discussing the Union. Bernardi works with supervisors on an ad hoc basis regarding interpretation of the rules. Bernardi was not aware that employees sold Girl Scout cookies or conducted raffles in patient-care or work areas on working time.

Nevertheless, employees testified that they routinely observed sales of chocolates, crackers, gift wrapping papers, soaps, Avon, and Tupperware in their work areas on working time. There are raffles for Super Bowl games and for basketball tournaments in working areas on working time. For instance, radiology technician Carmen Bautista was given a "Super Tupper Raffle" form during work time in her work area, the x-ray view room, by co-worker Aurora Fields in December 1998.

<sup>4</sup> Counsel for the General Counsel describes this rule as apparently valid on its face while counsel for the Charging Party asserts the rule is invalid for failure to define the term "solicitation." Because the General Counsel controls the theory of the case, I will not address the issue of validity of the rule. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

Bautista also saw a Super Bowl pool sheet circulating in the radiology department while employees were working, and in full view of supervisor Donna Bode, Director of Diagnostic Imaging. In fact, Bode placed an entry in the pool.

Bautista and registration clerk Jaime S. Duarte recalled that booklets and flyers advertising goods for sale, such as Avon catalogues and garment catalogues, were distributed at work, during work time, in patient care areas. Bautista also recalled that money was collected for bereavement funds, Christmas parties and dinners during working time while supervisors were present. Duarte recalled that registration secretary Corrine Nutt sold candy for her child's school and placed the candy on her desk in patient care areas in full view of supervisors. Duarte also sold chocolates when supervisors were present. He observed a co-worker selling Avon products while supervisors were present. Administrative assistant Caroline Plaza recalled an instance in which a medical records employee brought in jewelry for sale. Nicola Barnes, Director of Emergency and Trauma Services, was present when this occurred.

X-ray technician Victor Rios recalled that every year there were several Super Bowl pools. He remembered contributing to different pools throughout the years, always on working time in working areas. Rios remembered that his old supervisor, Tom Dottie, was present when some of the football pools were completed.

Respondent's supervisors observed solicitations and distributions in working areas during working times. For instance, Donna Bode, director of diagnostic imaging and radiology therapy, recalled on various occasions seeing employees selling Girl Scout cookies or collecting for football pools. According to Bode, she only observed this activity in hallways – never when employees were involved in patient care – and she always admonished employees to move into the lounge and confine these activities to their breaks. Bode did not receive any complaints about any of these solicitations or distributions.

Bode claims that she participated in a football pool while she was in the lounge getting a cup of coffee. Corena Parquette had the pool document with her in the lounge. Bode retrieved money from her office and brought it back to the lounge, gave it to Parquette who put it in her pocket. Bode also recalled when employee Armando's mother died, a leaflet in the department requested that money be given to certain employees. One was in the film file clerk area, one was in hallway where techs worked, and one was in the lounge. This was in 1997. Another collection was taken up for an employee in the lab who died. Several other similar collections have been taken over the seven years that she has worked there.

Nicola Barnes recalled seeing employee Witting selling Tupperware in the breakroom. She has not witnessed employees selling products during worktime. She recalled one time when jewelry was being sold in the office and Barnes sent the seller away. Barnes has seen cookies or candy being sold in the breakroom and about 6 months ago she saw an employee named Marcie selling M&Ms at her desk and told her to take them into the breakroom. She did not write up this incident.

Paul Eddie, chief technologist, admitted that he had observed Girl Scout cookies and other fund raising items being sold on the work floor on worktime. He routinely told employees to

move these activities to nonwork areas. He never observed any harassment in connection with these sales.

"Straight Talk" was distributed, read, and discussed during working time in working areas. For instance, Respondent normally distributed "Straight Talk" on work time in the inner nonpatient hallway, at work stations, and in lounges.

Jaime Duarte, emergency room registration clerk, read the issues of "Straight Talk" on worktime in the presence of his supervisor. Duarte also recalled that employees discussed the contents of "Straight Talk" during working time and breaks. Specifically, Duarte recalled discussions in which Nicola Barnes, Director of Emergency and Trauma Services, and Monica Hunter, Manager, Admissions, participated. Caroline Plaza, administrative assistant, recalled working time discussions in which Barnes participated. Duarte also recalled seeing the "Down the Drain" leaflets in hospital waiting areas, the information desk, the cafeteria and some patient areas. He observed discussions regarding this leaflet which involved Barnes and occurred on working time.

Based on this evidence, I find that Respondent did not utilize its no-solicitation, no-distributions rule to discipline or verbally counsel employees prior to the advent of the union activity. Rather, Respondent's evidence concedes that supervisors were aware of solicitations and distributions in working areas during working time and, at most, merely told employees to move their activities to the lounge.

#### *D. Disciplinary Warnings Allegedly Motivated by Union Activity*

##### *1. Facts*

##### *a. Carmen Bautista*

Carmen Bautista, a technical radiologist for 15 years, has worked for Respondent since 1990. She was an active, open union supporter. Bautista assisted in distribution of the Union's employee survey in February 1998. Bautista gave one of these surveys to Dominick Saati, ultrasound technician, who reported this incident to Paul Eddie, chief technologist, who in turn, reported the incident to Bode. According to Saati, he was with a patient when Bautista gave him the survey.

In early March 1998, Bautista was directed to report to Human Resources where she met with Director, Human Resources, Debra Bernardi and Donna Bode, Director of Diagnostic Imaging and Radiation Therapy. Bernardi told Bautista that ultrasound technician Dominick Saati had reported that Bautista gave him a Union survey while he was testing a patient. Bautista denied this, stating that she knew her rights and would not risk her job by behaving in this manner. Bernardi warned Bautista that although Bautista had a right to believe in the Union, her distributions on the Union's behalf must be when co-workers were not working. Bautista assured Bernardi that she would not distribute to her coworkers when they were working. Although no documentation of this conversation was placed in Bautista's formal personnel file, Bode retained notes of the conversation in her department files. Bode routinely retains such notes in order to document verbal counselings.

On April 11, Paul Eddie told Bode that Bautista was disrupting another associate while he was working. Bode first spoke to

the individual who launched the complaint, Corena Parquette, and then spoke to the allegedly disrupted employee, Florencio Jose, who said he did not want to take the literature Bautista offered but was being harassed and took it to get rid of Bautista. Jose was not with a patient at the time of the incident. Both Parquette and Jose wrote accounts of this incident at Bode's request.

On April 29, 1998, Bautista was told to meet with Director of Diagnostic Imaging and Radiation Therapy Bode. Debbie Carriaso, Bautista's immediate supervisor, was also present. Bode congratulated Bautista on passing her national licensing examination. Then Bode said that she had received complaints from two co-workers that Bautista was bothering them at work. In addition, Bode told Bautista that Nicola Barnes, director of emergency services, had complained that Bautista was speaking too much with employees in that department. Bautista objected that her co-workers were anonymous and she would like to be confronted with specific complaints. She denied bothering employees while they were at work. Bautista agreed that she was frequently in the emergency room department but asserted that she was there only on official business. Bode stated that she would check with Human Resources and the meeting would be continued at a later time. On May 1, 1998, Bautista received a "Second Written Warning" stating:

Carmen, approximately 30 days ago you were spoken to by the Director of Human Resources regarding the conducting of Union business with other Associates during work time.

On 04/11/98, you disregarded Hospital Policy a second time and engaged in the Union business of passing out Union Flyers to associates who were on duty.

Carmen, you are expected to cease and desist ALL union activities while on duty or attempt to involve others while they are on duty. Any further infraction of this type will result in termination.

##### *b. Victor Rios*

On May 8, 1998, employees Contreras and Albeso were in the film filling area, putting together old and new xrays in filing jackets for review by physicians. Fellow employees Victor Rios, Quiros, and Zavala approached and asked Contreras to sign a petition. They had asked Contreras to sign it before and he had previously refused. Contreras told them no again. The following day, Contreras complained to Eddie.

On May 11, 1998, Rios received a "1<sup>st</sup> Notice" warning which explained that on May 8, 1998, his conduct: "Harassment of Co-Workers during working hours to sign a petition in an attempt to dissolve an associate's disciplinary action," was a violation of Respondent's rules and showed, "Lack of Respect for Co-Workers." Rios denied speaking to fellow employees on his or their working time and denied making fun of Contreras or calling him chicken.<sup>5</sup>

<sup>5</sup> Rios did not appear at the hearing during presentation of General Counsel's case in chief. A sample of his signature was submitted by counsel for the General Counsel. Thereafter, upon resumption of the case, counsel for the General Counsel averred that Rios was not in the United States during presentation of her case in chief and thus outside the limits of her subpoena. In the interval between presentation of her

Bode recalled that Albeso and Contreras stated that Rios was a little bit on the pushy side. They said they did not want to sign the petition and it became an intimidating situation. Rios would not back off. Bode assured Contreras and Albeso that she would follow up and investigate. She spoke with Rios, Quiros and Zavala separately in her office. She told Rios there was a complaint lodged against him that he was alleged to have harassed two individuals to sign the petition. Rios said he was simply trying to get the petition signed.<sup>6</sup> Bode gave Rios a verbal counseling. Bode knew that Rios was a union supporter. She testified that this did not play any part in her decision to counsel him.

Bode routinely verbally counseled employees regarding minor infractions and maintained a record of the verbal counseling in an intradepartmental file. The record of verbal counseling was not sent to human resources. For instance, Bode verbally counseled Mary Hummey for harassing employees over a period of weeks regarding changing a radiology form. Hummey agreed she had tried to change the form but denied that she was intimidating or harassing her coworkers. Armando de la Rosa was verbally counseled for being abusive to coworkers. Bode explained that Rios, Quiros and Zavala were verbally counseled for harassing coworkers to sign the petition. Bode determined that the harassed employees were being truthful based on their past performances and there being no reason for them to lie. She determined that Rios, Zavala and Quiros were lying when they denied the encounter or said the encounter did not take place in a work area on work time.

*c. Jaime S. Duarte*

Jaime S. Duarte has worked for Respondent approximately 13 years. He has held his most recent position, registration clerk in the emergency room, for about 2 years. Until about a year ago, his supervisor was Monica Hunter. She was promoted to Manager, Admissions. His current supervisor is Annette Ferreria. Duarte was an open union advocate. He began distributing Union flyers on his lunches and breaks in early 1998. In February 1998, Duarte signed a letter to coworkers on union letterhead urging employees to complete the union survey.

On June 22, 1998, Duarte spoke to a coworker, Karen Barahona, asking her if she was for or against the Union. Barahona said she never thought of it. Duarte said okay, fine, and walked away. Thereafter, on July 1, 1998, Duarte went to Hunter's office to ask her a work-related question. Luis Burton, P.M. shift leadman, was also present. Hunter told Duarte that Barahona had reported the conversation to Hunter because Barahona did not like Duarte asking her if she was for the Union or not. Hunter told Duarte she had to give him a warning because it was on worktime. Hunter stated that if this occurred again,

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case in chief and presentation of Respondent's case, Rios returned to the United States and she subpoenaed him to appear. Over Respondent's objection, I allowed reopening of the General Counsel's case in chief for the limited purpose of allowing Rios to testify regarding disciplinary action against him.

<sup>6</sup> According to Rios, Bode also told him to "take care of his job." Counsel for the Charging Party argues that this constitutes an unlawful threat of job loss. However, the complaint does not so allege and, accordingly, I will not resolve this issue.

Duarte could be suspended or terminated. Duarte protested that the conversation occurred by the bed ward and employee lockers, away from patient care areas. Hunter responded that employees were not to speak of union activity on worktime anywhere at all ever.

The warning, a "First Written Warning (Verbal)," for misconduct, stated:

On Monday, June 22, [1998,] you approached a co-worker near the Equifax machine during the associate's work hour in regards to union information. You apparently were inquiring if this associate was for or against the union.

....

You and I have discussed this on numerous occasions. In April 1998, I verbally explained to you the Medical Center's policy regarding solicitation. Specifically, I requested you to refrain from discussing union issues on work time and in patient care areas.

Again on June 19, I emphasized to you the importance to adhere to the Medical Center's policy and stressed the importance of the core values. Specifically the "respect" of your coworkers and supervisors.

Jaime, I respect your right for union representation, however it is imperative that you refrain from any discussing or conduct[ing] any union business during work time. Any further infractions will result in further disciplinary action up to and including termination.

*d. Caroline Plaza*

In mid-April 1998, at approximately 8:30 a.m., Administrative Assistant Caroline Plaza delivered some charts to Alma Martinez, receptionist for Respondent's industrial clinic. Martinez had not yet raised the gate to open the clinic. The waiting area was visible through the gate. No patients were present in the area. Martinez was preparing to make a selection for health care benefits in the upcoming open season for enrollment. While copying some documents, Martinez asked Plaza about the "pros and cons" of enrolling in a health maintenance organization. While Plaza was responding to Martinez' question, Labor Relations/Employment Coordinator Veronica Galan<sup>7</sup> came into the area and asked to use the telephone. Martinez gestured to the phone. Plaza asked why Galan was present in the industrial clinic. Galan responded that she had brought her uncle in for "fast track" care. Plaza told Martinez that she did not like HMOs and used a preferred provider organization instead.

Galan immediately called Bernardi, Director, Human Resources, at home, regarding overhearing the conversation between Plaza and Martinez. According to Bernardi, Galan reported that Plaza and Martinez were comparing notes about benefits. Bernardi and Galan reported the matter to Hub Freeman, Assistant Administrator, Patient Care Services, on the following Monday, April 20. Galan told Freeman about overhearing the conversation about benefits. Freeman asked Galan for details and called in Nicola Barnes, Director of Emergency

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<sup>7</sup> Galan is an admitted agent within the meaning of Sec. 2(13) of the Act.

and Trauma Services, to discuss the matter further. Barnes advised Freeman that Plaza had been seen distributing a union flyer on working time in the industrial clinic.

On April 22, 1998, Plaza received a telephone call from Melissa Baxter, secretary to Hub Freeman, stating that Freeman wanted to see Plaza at 2 p.m. that date. When Plaza entered Freeman's office, she observed that Barnes, Bernardi, and Galan were already present. Galan reported that she had overheard Plaza speaking with another employee, Alma Martinez, about benefits. In Galan's view, Plaza was complaining about benefits. Freeman asked Galan to leave at that point. Barnes told Plaza that she had been observed distributing a union flyer in the industrial clinic. Plaza confirmed that she had given an employee a flyer about an upcoming union meeting at the employee's request. Freeman advised Plaza that all private conversations, such as the discussion about benefits and the distribution of the union flyer, were to be conducted in the breakroom during official breaktimes. Plaza was told that further incidents of conducting nonwork-related business on worktime in work areas would result in disciplinary action. Both Barnes and Freeman prepared notes regarding this meeting.

## 2. Analytical framework

In *Naomi Knitting Plant*,<sup>8</sup> the Board articulated the following application of the General Counsel's initial burden pursuant to *Wright Line*:<sup>9</sup>

... to set forth a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show

(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

*FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994) (citations omitted).

Proof of the protected activity, employer knowledge of the activity, and employer animus toward the activity supports an inference that the employee's protected conduct was a motivating factor in the employer's action. The employer may then rebut the General Counsel's case by proving that animus played no part in its actions or the employer may demonstrate that the same personnel action would have taken place in any event.

<sup>8</sup> 328 NLRB 1279 (1999).

<sup>9</sup> 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

## 3. Contentions

Counsel for the General Counsel notes that no disciplinary action was taken when employees were observed by supervisors either soliciting or distributing during working time or in work areas for nonunion-related activities. Accordingly, counsel asserts that Respondent's no-solicitation, no-distribution rule has been applied only to union-related discussions or literature, in violation of Section 8(a)(1) and (3).<sup>10</sup> Counsel for the Charging Party notes that there is no evidence that any of the disciplinary actions would have taken place absent the employees' union activity. Counsel notes distribution of "Straight Talk" in the same areas where the employees were disciplined for engaging in solicitation and distribution, asserting that this evidences Respondent's understanding that discussions and distributions in these areas did not disrupt patient care.<sup>11</sup> Counsel for Respondent asserts that the verbal counseling of Bautista, Rios and Plaza and the warnings to Bautista and Duarte were lawful and consistent with Respondent's uniform enforcement of its policies. Initially, counsel asserts that the employees' conduct was not protected,<sup>12</sup> and no animus has been shown. Accordingly, counsel argues that union activity has not been shown to be a motivating factor. Moreover, counsel asserts that the counselings and warnings would have occurred in any event.

## 4. Analysis

The union activities of Bautista, Rios, Duarte, and Plaza were the subjects of the meetings conducted by management in which these employees were counseled or warned about their solicitations or distributions. Accordingly, the General Counsel has shown both activity and knowledge of activity. There is substantial evidence of Respondent's animus toward the union activity of its employees as evidenced by comments in the "Straight Talk" newsletters<sup>13</sup> and by the invitation to employees to report on potentially lawful union activity of their co-workers. This evidence supports an inference that protected activity was a motivating factor in Respondent's actions. Respondent has failed to prove that protected activity played no part in its actions or that the same actions would have occurred in any event. The record reflects that other employees were not counseled or warned regarding violations of the no-solicitation, no-distribution rule when the solicitation or distribution was not

<sup>10</sup> Counsel cites *Opryland Hotel*, 323 NLRB 723, 731 (1997); *Teksid Aluminum Foundry*, 311 NLRB 711 (1993); *Willamette Industries*, 306 NLRB 1010 fn.2 (1992) (restriction on conversations applied only to union-related talk is violative).

<sup>11</sup> Counsel cites *Fairfax Hospital*, 310 NLRB 299, 312 (1993), enf'd 14 F.3d 594 (4th Cir. 1993), cert. denied, 512 U.S. 1205 (1994) (perhaps limitation on employee activity is not warranted by health care considerations where employer solicits and distributes in those areas).

<sup>12</sup> Counsel cites *Electronic Data Systems Corp.*, 331 NLRB 343 (2000); *United Parcel Service*, 311 NLRB 974 (1993); *Washington Adventist Hospital*, 291 NLRB 95, 102-103 (1998) (manner in which employee conducts activity may strip his action of Act's protection).

<sup>13</sup> For instance, the newsletter opined that the Union was interested only in obtaining employees' money, not in representing them. It stated that union solicitation of employees in the cafeteria was unethical and showed a lack of respect. Although these are not unlawful statements, it was clear to employees that Respondent disliked their attempt to unionize.

union related. Employees were, at most, simply told to move their activities to the employee lounge. Accordingly, I find that the counselings and warnings given to Bautista, Rios, Duarte, and Plaza were unlawfully motivated.

*E. Alleged Disparate Enforcement of No-Solicitation, No-Distribution Rule*

The complaint alleges that Respondent, acting through Debra Bernardi, Director, Human Relations, and Monica Hunter, Admissions Manager, enforced its no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions and prohibiting employees from speaking about the Union during working time while not prohibiting non-union solicitations and distributions or conversations about non-union topics.

1. Facts

*a. Allegation regarding Debra Bernardi*

As mentioned above with regard to Bautista's disciplinary actions, Bautista gave a union survey to Dominick Saati, ultrasound technician, who reported this incident to Paul Eddie, Chief Technologist, who in turn, reported the incident to Director of Diagnostic Imaging and Radiology Therapy Donna Bode. Saati reported to Eddie that he was with a patient when Bautista gave him the literature while Bautista denied to management that Saati was with a patient at the time. In any event, while counseling Bautista, Bernardi warned Bautista that although Bautista had a right to believe in the Union, her distributions on the Union's behalf must be when coworkers were not working. Bautista assured Bernardi that she would not distribute to her coworkers when they were working.

*b. Allegation regarding Monica Hunter*

In April 1998, Jaime Duarte, emergency room registration clerk, entered the emergency room breakroom and gave a union flyer to registered nurse Robert Bargas. Janice Stanley, Clinical Supervisor, was present in the breakroom at the time. According to Duarte, Stanley jumped up and left the breakroom when she saw Duarte hand the literature to Bargas. When Duarte left the breakroom, he encountered Stanley speaking with Nicola Barnes, Director of Emergency and Trauma Services. Barnes stopped Duarte and asked him if he was passing out union flyers. He said that he was doing so in the breakroom. Barnes asked Duarte if he was on a break and he replied affirmatively. Barnes stated that Duarte could not be on a break and he protested that he was. Barnes asked Duarte who he told that he was going on break. Duarte responded that he did not have to tell anyone.<sup>14</sup> Barnes asked who Duarte's immediate supervisor was and went to speak to the supervisor, Monica Hunter, Manager, Admissions.

<sup>14</sup> Duarte testified that the procedure when an employee wants to go on break is to let the supervisor know or, if no supervisor is present, to let your co-workers know. Each morning, the employees complete a form stating when they will take their lunch and breaks. Nevertheless, he admitted he told Barnes he did not have to tell anyone because he was reacting to Barnes shaking her finger in his face and telling him that he was not on break and could not be on break.

On the following day, Duarte reported this incident to Hunter. Hunter confirmed that Barnes had spoken to her about the situation. At Hunter's request, Duarte recounted his conversation with Barnes. Hunter confirmed independently that Duarte was on break. Nevertheless, according to Hunter, she told Duarte that he needed to be careful; he needed to communicate, "clearly where he was, when leaving the department, and indicating that he was on break. And that if he was in other areas, that he was definitely on break and not socializing."<sup>15</sup>

2. Contentions

Counsel for the General Counsel contends that Respondent discriminatorily applied its no-solicitation, no-distribution rule by freely allowing solicitations and distributions for clothing, flowers, and other matters but failing to accord the same freedom to union solicitations and distributions.<sup>16</sup> Counsel for the Charging Party asserts that Respondent's no-solicitation, no-distribution rule is ambiguous for failure to define "solicitation." Further, counsel asserts that the no-solicitation, no-distribution policy was unlawfully interpreted by Respondent to bar ordinary conversation about the Union while allowing workers to discuss other topics during working time.<sup>17</sup> Respondent notes that because Hunter was able to confirm that Duarte was indeed on a break at the time of the incident, there was never any discriminatory enforcement of the rule. Moreover, Respondent asserts that it has consistently enforced its rule in a non-discriminatory manner. Respondent contends that non-Union distributions and solicitations that Respondent knew of were handled the same way that Union distributions and solicitations were. Respondent also asserts that its distribution of anti-Union literature may not be relied upon as an example of disparate enforcement of the no-solicitation, no-distribution rule.<sup>18</sup>

3. Analysis

The issue framed by the complaint is whether Bernardi and Hunter enforced the no-solicitation, no-distribution rule selec-

<sup>15</sup> According to Duarte, Hunter also said administration knows more or less who's pro-union and who's anti-union and they're watching to try to see what is going on. Duarte also attributed to Hunter an admonition that employees could be terminated or suspended if, "we're caught with union activity advancement." Hunter denied these statements. Based upon their respective demeanors, I credit Hunter's denial.

<sup>16</sup> Counsel cites *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995) (where employer regularly permits nonemployee commercial organizations to solicit and distribute but does not allow union to solicit, employer discriminatorily enforces its ban on solicitation); *Riesbeck Food Markets*, 315 NLRB 940, 941 (1994) (refusal to permit union solicitation while permitting extensive civic and charitable solicitation was discriminatory).

<sup>17</sup> Counsel cites *Opryland Hotel*, 323 NLRB 723, 729 (1997) (rule, if valid, was discriminatorily enforced against union solicitation).

<sup>18</sup> Respondent cites *Hale Nani Rehabilitation*, 326 NLRB 335, 338, 351 (1998) (Member Hurtgen, concurring, "employer's valid rule against employee distribution is not rendered unlawful simply because the employer chooses to use its own premises to engage in its own distribution."); (Member Brame concurring in result, "An employer has the right to engage in noncoercive solicitation and distribution activities and maintain at the same time a valid no-solicitation/no-distribution rule.")

tively and disparately by prohibiting Bautista and Duarte from soliciting and distributing regarding the Union during working time while not prohibiting soliciting and distributing regarding non-Union topics. I find that Respondent violated the Act in this regard.

Initially, I note that Respondent's supervisors testified that when they observed solicitations or distributions for cookies, candy, football pools, and other non-Union matters, they uniformly responded by telling employees to move to the employee lounge. Respondent's supervisors did not testify to any attempt they made to ascertain whether employees were on break or with patients when these events took place. The employees were simply told to move to the lounge area. Moreover, Respondent did not have a request in place, regarding these non-Union solicitation and distributions, inviting associates to report violations of the rule. In the context of a union organizing campaign in which the rhetoric was somewhat heated, employees were in effect invited to show their allegiance to management by reporting on their fellow employees' union activities. In this manner, Respondent would certainly become aware of union distributions and solicitations while remaining ignorant of cookie, candy, and other nonunion-related distributions.

Further, I note that no distributor of cookies, candy, or other non-Union items was counseled regarding the meaning of the no-solicitation, no-distribution rule. Such counseling, when occurring only when the solicitation or distribution is union related, necessarily chills union activity. Accordingly, I find that Respondent, through Bernardi, disparately enforced its no-solicitation, no-distribution rule against Bautista on March 3 by calling her into a conference with Bernardi and Bode and reminding her of the no-solicitation, no-distribution rule. Similarly, I find that Hunter disparately enforced the no-solicitation, no-distribution rule against Duarte when she counseled him in April 1998 regarding his distribution of union literature while on his break in the employee lounge. Further, by admonishing him about socializing, Hunter disparately enforced the rule regarding what matters Duarte might discuss with fellow employees on his working time.<sup>19</sup>

#### *F. Alleged interrogation and creation of impression of surveillance by Barnes in mid-December 1997*

##### 1. Facts

In December 1997, Administrative Assistant Caroline Plaza had a conversation with Nicola Barnes, Director of Emergency and Trauma Services. According to Plaza, Barnes observed Plaza walking in a hallway ahead of her and caught up with Plaza, stating that Stephanie Winkler, Barnes' administrative assistant, had reported to Barnes that there had been a Union meeting on the previous evening and Winkler had recounted to

Barnes the names of all employees in attendance. Barnes told Plaza that Winkler had reported that Plaza was present. Plaza confirmed that she had attended. Barnes asked Plaza what she thought about the Union. Plaza responded that it was interesting.

Barnes testified that she had no idea whether Plaza supported the Union or not. Barnes denied asking Plaza whether she supported the Union. Barnes acknowledged that around this time there were Union flyers with Plaza's pictures in them. Barnes denied asking Plaza about a Union meeting or telling Plaza she knew Plaza went to a Union meeting. Barnes testified that she never spoke with Winkler about who may or may not have attended a Union meeting. Barnes denied any conversations at all with Plaza about the Union.

Both counsel for the General Counsel and counsel for the Charging Party argue that Barnes' testimony should be discredited as distorted and biased. Counsel for Respondent asserts that Plaza's testimony was erratic, inconsistent, and contradictory and should not be credited. Plaza was a courteous, attentive and sincere witness. She appeared to give thought to her answers before speaking and took care at recalling details. Although she stated on cross-examination that Barnes did not ask her any questions, when she was asked whether she considered, "what do you think" to be a question, she said, yes, and corrected her testimony. I do not disbelieve her testimony based upon her apparent misunderstanding of the question on cross-examination. In addition, it is inherently improbable that an employee still working for Respondent would fabricate an event such as this. Accordingly, based on both demeanor and inherent probability, I credit the testimony of Plaza.

##### 2. Contentions

Counsel for the General Counsel argues that Plaza was not an open and notorious union supporter and the conversation was initiated by Barnes and was not a casual conversation between friends. Accordingly, counsel asserts that Barnes unlawfully interrogated Plaza<sup>20</sup> and created the impression that Respondent was spying on union activity.<sup>21</sup> Counsel for the Charging Party notes that Plaza was not yet an open Union supporter and thus questioning Plaza about a Union meeting was coercive.<sup>22</sup> Moreover, counsel asserts that reporting to an employee that management knows of the employee's union

<sup>20</sup> Counsel cites *Rossmore House*, 269 NLRB 1176 (1984), enforced sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

<sup>21</sup> Counsel cites *Grand Canyon Mining Co.*, 318 NLRB 748, 753 (1995); *Gupta Permold Corp.*, 289 NLRB 1234, 1247 (1988) (relating to employees how many attended union meeting creates impression that union activities are under surveillance).

<sup>22</sup> Counsel cites *Pleasant Manor Living Center*, 324 NLRB 368 (1997); *Diversified Bank Installations*, 324 NLRB 457, 471-472 (1997) (attempts to find out union sympathies of an employee who has not disclosed her attitude toward the union, coercive).

<sup>19</sup> It is not necessary to resolve the credibility conflict between employees and management regarding solicitation and distribution practices at the hospital because, even crediting Respondent's witnesses, union-related solicitations and distributions were treated differently than nonunion-related solicitations and distributions. Were it necessary to resolve the credibility conflict, I would find that Respondent's supervisors were well aware of many violations of the rule and did not strictly enforce it until the union campaign began.

activity is similarly coercive.<sup>23</sup> Counsel for Respondent avers that even if Plaza is credited, no violation occurred.<sup>24</sup>

### 3. Analysis

In order to determine whether an employer's questioning of an employee about the union reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed by the Act, it is necessary to consider the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation.<sup>25</sup> In this instance, I find the questioning coercive. Plaza was stopped in the hallway by the director of emergency and trauma services, who claimed to know who had attended a Union meeting, thus giving the impression that she was keeping tabs on employees' union activity. Plaza, whose union activity was not yet open and notorious, was asked in a one-on-one conversation what she thought about the Union. Such questioning, when combined with creation of the impression of surveillance, violates the Act.<sup>26</sup>

#### *G. Alleged interrogation and threat of discharge by Barnes on or about March 13, 1998*

##### 1. Facts

On March 13, 1998, scheduler/insurance verifier Virginia Semponis, a 29-year employee with Respondent, left work at about 6 p.m. As she approached the parking structure, she was reading a copy of "Straight Talk." She heard Nicola Barnes, Director of Emergency and Trauma Services, call from behind her, asking Semponis to hold the door to the elevator open. Semponis did so, pushed the floor number for Barnes, and returned to reading. According to Semponis, Barnes asked Semponis if she was for or against the Union. Semponis responded that she was for the Union. Barnes asked why and Semponis responded that she wanted better benefits and better retirement. Barnes stated that Semponis would not get better benefits: "They're not going to give it to you. You know you're not going to get any of it."

Semponis explained to Barnes that her dad had belonged to a Union and she had always honored the Union and never crossed a picket line. Barnes responded that if it ever came to a strike, Semponis could get fired. Barnes also stated that a nurse who had not paid her dues the month before being promoted to a supervisory position might get fired because of that. Barnes concluded that the Union was not going to do anything for Semponis, they were going to screw her, and it was stupid. Barnes urged Semponis to think about it.

Barnes testified that she initiated a conversation with Semponis about a statement in "Straight Talk" about signing Union cards being the equivalent of signing a blank check. Semponis became agitated and responded that the employees had needed

a Union for 30 years. Barnes countered that it seemed a shame that employees who did not want to be part of the Union would have to pay dues anyway. Semponis said she did not care about that and added that if her father had been working a Union job when he got sick, he would have been taken care of. Barnes denied that she mentioned a strike to Semponis.

##### Contentions

Counsel for the General Counsel asserts that Barnes' questioning Semponis, even if it was about "Straight Talk," was unlawful under the totality of the circumstances.<sup>27</sup> Counsel further argues that Semponis should be credited over Barnes regarding the strike statement and asserts that this statement was a coercive threat of discharge.<sup>28</sup> Counsel for the Charging Party asserts that Barnes initiated the conversation without assuring Semponis that there would be no reprisals and, accordingly, under all the circumstances, the interrogation was coercive.<sup>29</sup> Counsel also avers that Barnes' statement about strikes leading to discharge was an unlawful threat.<sup>30</sup> Counsel for Respondent argues that Barnes' testimony should be credited noting that significant parts of Semponis' testimony were not included in Semponis' affidavit to the NLRB. Counsel further notes that Barnes did not question Semponis. Rather, Barnes merely commented about a statement in "Straight Talk." Accordingly, there can be no interrogation.<sup>31</sup>

##### 3. Analysis

As between Semponis and Barnes, I credit Semponis' testimony. Her testimony was straightforward and assured. Moreover, with 29 years of service for Respondent, I find it highly improbable that she would embellish an encounter with Barnes. Accordingly, based on all the circumstances, I find that the questioning by the Director of Emergency and Trauma Services in a one-on-one conversation in which the supervisor also threatened that employees could be fired for going on strike coercive.<sup>32</sup>

<sup>27</sup> Counsel cites *Reeves Bros., Inc.*, 320 NLRB 1082, 1084 (1996) (questioning well-known union supporter in order to elicit his brother's support to campaign against union, coercive).

<sup>28</sup> Counsel cites *Gino Morena Enterprises*, 287 NLRB 1327, n.3, 1331 (1988) (questioning employees, then threatening with job loss and reduced hours, unlawful).

<sup>29</sup> Counsel cites *BJ's Wholesale Club*, 319 NLRB 483, 484 (1995) (direct question regarding employee's union sentiments in connection with communication of antiunion campaign message, coercive).

<sup>30</sup> Counsel cites *Pirelli Cable Corp.*, 323 NLRB 1009, 1018 (1997), enf. denied in relevant part, 141 F.3d 503 (4th Cir. 1998) (threat of job loss for engaging in strike, unlawful).

<sup>31</sup> Counsel cites *Shepherd Tissue, Inc.*, 326 NLRB 369 (1998); *Sound One Corp.*, 317 NLRB 854, 857 n.3 (1995), enf. 104 F.3d 356 (2d Cir. 1996); *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978), enforced in part, denied in part, 652 F.2d 660 (6th Cir. 1981). *Inco Container Co.*, 208 NLRB 874, 880 (1974) (questioning found, under all the circumstances, not coercive).

<sup>32</sup> See, *Rossmore House*, supra, 269 NLRB at 1177.

<sup>23</sup> Counsel cites *Portsmouth Ambulance Service*, 323 NLRB 311, 319 (1997); *Yenkin-Majestic Paint Corp.*, 321 NLRB 387, 390 (1996), enf. 124 F.3d 2020 (6th Cir. 1997).

<sup>24</sup> Counsel cites *Silver State Disposal Co.*, 271 NLRB 486, 492 (1984); *Bardcor Corp.*, 270 NLRB 1083, 1087 (1984) (coincidental presence of supervisor across street from union meeting not violative).

<sup>25</sup> See, e.g., *Parts Depot*, 332 NLRB 670, 671 (2000).

<sup>26</sup> See, *Rossmore House*, supra, 269 NLRB at 1177.

*H. Alleged interrogation and solicitation of grievances by Freeman, and threat of unspecified reprisal by Freeman and Bernardi<sup>33</sup> on or about April 21, 1998*

1. Facts

The litigants presented two conflicting versions of a conversation in Assistant Administrator, Patient Care Services, Hub Freeman's office, incident to admonishment of Plaza regarding discussing Respondent's health benefits in a patient care area. The portion of this conversation dealing with disparate enforcement of Respondent's solicitation rule has already been discussed. In addition, the parties discussed other matters. According to Plaza, Barnes said that she had heard that Plaza was passing out Union flyers and intimidating people. Plaza denied this and asked who she was supposed to be intimidating. Barnes responded that this information was confidential. Bernardi stated, "Caroline this is not good. You're going to get into a lot of trouble. This is not good." Freeman interjected that he had an open door policy. He said, "Apparently you have some problems. What is it that we can do for you?" Plaza responded that she could think of nothing. Freeman stated that he had heard Plaza was in the front lines with the Union and asked her if this was true.<sup>34</sup> Plaza responded that it was. Freeman asked Plaza if she knew what she was doing. He stated that she was bringing on a lot of trouble for herself.<sup>35</sup> Freeman told Plaza that from now on she was to drop off work and not talk to anybody. He told her the only time she could talk to anyone was in the break room or lunch and to make sure the other employee was on break too.

According to Barnes, toward the end of the meeting, she told Plaza that patient expectations included no flyers being handed out in patient care areas. Plaza responded that she had given a flyer to an employee in the Fast Track area because the employee had asked for the flyer. Barnes denied saying, I hear you're handing out flyers and intimidating employees. Barnes denied that Freeman said words to the effect of this is not good, we hear you're out on the front lines. Bernardi substantiated much of Barnes' testimony. She agreed that Freeman did not accuse Plaza of being on the front line or tell her something to the effect of, "This is not good," or "You are asking for a lot of trouble." Freeman did not testify. Neither Bernardi nor Barnes was asked about Freeman's alleged "open door" statement.

2. Contentions

Counsel for the General Counsel and counsel for the Charging Party argue that Freeman's invitation to Plaza to bring her problems to him amounted to solicitation of

grievances in violation of the Act.<sup>36</sup> Counsel also assert that Freeman interrogated Plaza by asking her if it was true that she was "in the front lines" supporting the Union.<sup>37</sup> Finally, counsel assert that by telling Plaza she was bringing on a lot of trouble by supporting the Union, Freeman threatened her with unspecified reprisals. Respondent contends that Plaza's testimony regarding the alleged interrogation and the alleged threat should not be credited because it was inconsistent, erratic, and rebutted by two witnesses. As to alleged solicitation of grievances, Respondent argues that the statement attributed to Freeman does not constitute a solicitation.<sup>38</sup>

3. Analysis

I credit Plaza's testimony over that of Barnes and Bernardi. I note in particular that Barnes and Bernardi were not asked about the alleged solicitation of grievances and Freeman did not testify. Although Barnes and Bernardi were apparently thoughtful and consistent in their testimony, I find that Plaza's testimony is comparatively more believable as well as more inherently probable. Given the invitation to air grievances and the threat of "trouble" for supporting the Union, the interrogation is also violative.

I. ALLEGED REQUEST TO REPORT UNION ACTIVITY TO RESPONDENT

1. Facts

On March 30, 1998, Respondent distributed an edition of "Straight Talk," a hospital newsletter, to all employees. After reciting that it had received complaints about intimidation by Union representatives, through home visits or harassment on the job, Respondent's president Gerald T. Kozai alerted employees, in this "Straight Talk," that the Act prohibited coercion or intimidation by a Union. Kozai continued:

These union activists are the same people who say you need a union to protect your rights. Think about it. These people who say they want to represent you don't seem to have any qualms about violating your rights when it suits them.

<sup>36</sup> Counsel cite *Sweet Street Desserts*, 319 NLRB 307 (1995), enf'd 107 F.3d 7 (3d Cir. 1997)(supervisor's remarks to come to her with problems reasonably viewed as solicitation of grievances); *Windsor Industries, Inc.*, 265 NLRB 1009, 1016 (1982)(employer who has not previously solicited complaints, implicitly promises to remedy complaints invited only after union campaign).

<sup>37</sup> Counsel cite *Portsmouth Ambulance Service*, 323 NLRB 311, 313, 319 (1997)(abusive interrogation in conjunction with conveying impression of surveillance and unlawful threat, violative); *Shen Automotive Dealership Group*, 321 NLRB 586, 597 (1996)(interrogation in conjunction with involvement in employee withdrawal of support for union, coercive); *Stoody Co.*, 320 NLRB 18, 18-19 (1995)(interrogation in combination with other unfair labor practices, violative).

<sup>38</sup> Counsel cites *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994) (employer must expressly or impliedly promise to remedy grievances in order for solicitation to be violative); *Recycle America*, 308 NLRB 50, 56 (1992)(in context of regular invitation to air grievances, supervisor's solicitation of employee's concerns not violative); *Mariposa Press*, 273 NLRB 528, 528-529 (1984) (under all circumstances, employer's open door statement did not constitute unlawful solicitation); *K & K Gourmet Meats v. NLRB*, 640 F.2d 460, 466-467 (3d Cir. 1981)(employer's hope to settle disputes with employees directly did not constitute solicitation).

<sup>33</sup> Counsel for the General Counsel moved to amend the pleadings to substitute Bernardi rather than Galan in conformance with the testimony. The motion was granted.

<sup>34</sup> Plaza had to be led in order to recall that Freeman asked her if it was true [that she was in the front lines]. Over Respondent's objection, she was allowed to answer.

<sup>35</sup> Originally Plaza attributed that alleged threat to Bernardi. Later she attributed the statement to Freeman.

We respect your privacy and your right and ability to decide whether you want to be represented by a union. We also are committed to protecting your freedom to choose.

If you have any questions, or want to report a questionable incident involving union organizers, talk to your supervisor or other member of the management team.

On May 4, 1998, another "Straight Talk" from Kozai noted that the Act protects the right to organize as well as the right to refrain from organizing. This newsletter continued:

This same law gives you, the Associate who does not support the Union, EQUAL RIGHTS! You are protected from those who would harass, coerce, intimidate or any way attempt to force you to accept their way of thinking. It is your right to decide! The law and the Medical Center are on your side. Don't let them disturb you or our patients. You have the right to let them know your decision!

If anyone should interfere with your rights, please advise your supervisor immediately.

#### Contentions

Counsel for the General Counsel asserts that Respondent's statements are so vague as to invite employees generally to inform on fellow workers engaged in lawful union activity and thus constitute interference with Section 7 rights.<sup>39</sup> Counsel for the Charging Party asserts that Respondent's requests that employees report lawful union activity violates Sec. 8(a)(1).<sup>40</sup> On the other hand, counsel for Respondent avers that the issues of "Straight Talk" lawfully inform employees to report unlawful conduct.<sup>41</sup>

#### 3. Analysis

Respondent's invitation to associates to report what they perceived as purely subjective harassment without regard to the lawfulness of the union activity complained of clearly violates the Act.<sup>42</sup>

#### *J. Alleged interrogation and demand for surrender of Union literature by Burton on or about May 21, 1998*

##### 1. Facts

According to Tanya Mia Llera, clinical assistant to the acute care/critical care services department, she spoke with security guard Lionel Burton<sup>43</sup> on May 21, 1998, at 7 a.m. at the security desk on the first floor. Burton asked Llera what she had in her hand. Llera told him it was a Union flyer. Burton asked where Llera got the flyer and she told him she received it at the

front door. Burton asked Llera if she was going to read the flyer and she responded affirmatively. Another employee, Marli Malasen was in the area. Burton approached Malasen and asked her if she was going to read the flyer. Malasen asked why. Burton responded that he had not seen anything like the flyer. Burton then took the flyer from Malasen's hand.

On this same day, Janie Jones, a certified nurse assistant, reported to work shortly before 7:30 a.m. According to Jones, when she entered the security desk area, Burton asked her to give him her Union leaflet. She asked why and Burton responded that he wanted to trash it. Jones asked why, stating that she had not read it yet. Burton responded that it did not matter because it was the same old thing. Jones did not surrender her flyer to Burton.

Rudolph Ronny Forrest, a respiratory practitioner, recalled an occasion in May 1998 when he and some co-workers were in front of the hospital passing out flyers. The leafleters received a report that security guard Burton was taking flyers from employees. In response, a business representative instructed Forrest to consult with Burton and advise him that it was illegal to take the flyers. Forrest proceeded to speak with Burton. However, he had to wait for Burton to finish another conversation first and while he was waiting, Burton took a Union leaflet from Forrest's hand. Forrest asked Burton if he was taking flyers and Burton responded, no, employees were giving him the flyers. Forrest told Burton that the Union had asked him to explain to Burton that confiscating the flyers was illegal. Forrest requested that Burton not take flyers anymore.

About May 26, 1998, Burton recalled speaking to several employees about flyers. Four Union organizers were present at St. Francis that day right outside the south exit of the pavilion handing out flyers to associates as they came to work. Organizers were standing right outside the glass doors with just enough room for one associate to pass them. Burton spoke to some of the employees from various security posts. All the conversations were one on one. Burton does not recall specific conversations except that he remembers saying are you going to need that flyer or "Are you going to keep that flyer." Some of the employees said no you can have it or no here it is. Of those who gave him their flyers, he thought they acted uninterested. Those of the employees who kept the flyer said that they wanted to read the flyer. Burton testified that he did not take any of the flyers by force and he did not reach across any desk to grab the flyer. It would have been physically impossible for him to grab the flyer because the desks were deep and high. He did not take any of the flyers out of any one's hand. No one asked why he wanted to see the flyer. This happened about eight times. Jones is the only one he remembers. Burton did not tell Jones or any of the employees that he wanted to trash or dump the flyer. He did not say, "It's the same old thing." He did not say anything derogatory about the Union or ask any employees to identify themselves. He does not remember what he did with the flyers. He did not ask employees whether they supported the Union. Burton testified that he maintained an impartial demeanor during these conversations.

Burton recalled that Forrest told him he could not take flyers from employees. Burton told Forrest he was not taking any flyers from the employees. No one else was present during this

<sup>39</sup> Counsel cites *Patrick Industries*, 318 NLRB 245 (1995); *Nashville Plastics*, 313 NLRB 462 (1993); *Arcata Graphics*, 304 NLRB 541 (1991) (request that employees who were bothered or harassed by pro-union employees should report this to management, may include lawful attempts by union proponents and thus tend to restrain lawful activity).

<sup>40</sup> Counsel cites *Nashville Plastic Products*, supra, 313 NLRB 462 (1993) and *Liberty House Nursing Home*, 245 NLRB 1194, 1197 (1979) (request to report harassment by pro-union employees with threat to discharge responsible person, unlawful).

<sup>41</sup> Counsel cites *Liberty Nursing Homes*, supra, 245 NLRB at 1197 (1979) (request to report threats by pro-union employees not unlawful).

<sup>42</sup> *Consolidated Diesel Co.*, 332 NLRB 1019 (2000).

<sup>43</sup> Respondent admits that Burton is an agent within the meaning of Sec. 2(13) of the Act.

conversation. Burton does not remember that Forrest had any flyers with him and he did not take any flyers from Forrest.

## 2. Contentions

Counsel for the General Counsel and counsel for the Charging Party assert that confiscation of Union literature violates the Act.<sup>44</sup> Respondent notes that Burton did not demand surrender of Union literature. Rather, he merely requested to see copies of the literature. Accordingly, employees were not coerced.<sup>45</sup> Respondent also contends that Burton's questions to employees were not coercive under all the circumstances.<sup>46</sup>

## 3. Analysis

It is clear that Burton felt that the presence of Union organizers while employees were reporting for work created a security problem. Based on his admission that this was so, I credit the testimony of employees who testified that they were asked whether they were going to read the literature and were either asked to surrender their Union literature to Burton or he took it from them. These actions tend to restrain and coerce employees and interfere with their right to organize for the Union.

*K. Alleged interrogation, false accusation of damage to Respondent's property, and threat of unspecified reprisals by Barnes on or about June 19, 1998*

## 1. Facts

In mid-June 1998, after completing his evening shift, respiratory practitioner Forrest was distributing leaflets outside the emergency room entrance. Although other employees were also in the area distributing leaflets, Forrest was standing by himself, on one side of the doorway. According to Forrest, Barnes honked her horn and shook her finger at Forrest as she drove into the parking structure. She yelled at Forrest from the fifth floor of the parking structure that she needed to speak to him. When she reached the ground floor, Barnes asked Forrest why he tore up hospital property. He asked her what property and she identified a glass cover of a bulletin board that she asserted had been destroyed. Forrest asked why Barnes thought he had damaged the property and Barnes responded, well, I'm telling you to be careful. She repeated this admonition two more times. Forrest inspected the glass cover thereafter and could discern no damage.

Barnes recalled the conversation taking place around 7 or 7:30 a.m. while she was walking from the parking structure into the hospital. She saw Forrest standing in that area and told Joan Rolland, who was with her, "Oh, there is Rudy [Forrest], my friend Rudy." Barnes said, "oh, I heard the night shift has been

up to their old tricks and breaking into the bulletin boards, or messing with the bulletin board." (Although there was no official report regarding this, Barnes explained she had heard a rumor.) Forrest asked if he was being accused and pointed his finger at Barnes' face. He repeated that she was accusing him and she again denied it. Barnes testified that she did not threaten Forrest with reprisals for union activity. She further testified that she did not honk her horn or point at Forrest when she drove in. Nor did she yell at Forrest from the parking structure. She did not ask, why did you tear up hospital property. She did not tell him he ought to be careful. Upon walking into the hospital, she did not turn around and yell anything. At the time of the conversation, Barnes testified that she did not know whether Forrest was a Union supporter. Barnes had not seen him handing out leaflets or seen his name in Union flyers or seen his picture in Union flyers.

Joan Rolland, clinical director for intensive care, was present during the conversation between Forrest and Barnes. She testified that Barnes said, oh there's Forrest, I want to talk with him. Forrest did not stop when she yelled to him. He kept walking away. Barnes said, I just want to talk to you, Forrest. Barnes asked if Forrest knew of any vandalism to any hospital bulletin boards. He responded with animated physical gestures pointing a finger at Barnes. Rolland thinks she heard the entire conversation between Forrest and Barnes although she was standing about 10 feet away. Rolland did not hear Barnes threaten Forrest for breaking in or interrogate Forrest, and the issue of the Union did not come up at all. She did not hear Barnes tell Forrest he better be careful. She does not think Barnes turned around after the conversation and said anything to Forrest. Rolland did not see Barnes point her finger in Forrest's face.

## 2. Contentions

Counsel for the General Counsel and counsel for the Charging Party note that Forrest was distributing Union flyers at the time Barnes drove by and when Barnes approached to speak with him. Forrest had engaged in such distribution on ten prior occasions. He also signed a February 9, 1998 open letter regarding the Union survey. This letter was widely distributed throughout the hospital and Barnes was observed with a copy of the letter. Accordingly, approaching Forrest while he was engaged in distribution of Union literature and even jokingly accusing him of damage to hospital property could only have been meant as retaliation for engaging in union activity. Further, telling him to "be careful" could only be interpreted as a threat.<sup>47</sup> Counsel for Respondent notes that Forrest never testified that the subject of the Union was mentioned during the conversation. Further, there is no evidence that he was questioned about the Union. Counsel further notes that there is no evidence that Barnes' accusation of Forrest was false because Forrest did not testify that he did not vandalize the bulletin board. Moreover, counsel asserts, even if the accusation was false, there is nothing to link it to Forrest's union activity. Finally, counsel argues that Barnes denies telling Forrest to be

<sup>44</sup> Counsels cite *Beverly California Corp.*, 326 NLRB 232 (1998), enfd in part, vacated in part, 227 F.3d 817 (7<sup>th</sup> Cir. 2000); *Mediplex of Wethersfield*, 320 NLRB 510, 516 (1995); *Farm Fresh, Inc.*, 305 NLRB 887 (1991); *Keeler Brass Automotive Group*, 301 NLRB 769 (1991); *Filene's Basement Store*, 299 NLRB 183 (1990) (actions of guards which interfered with union's right to communicate with employees violate Act).

<sup>45</sup> Counsel relies upon *S.S. Kresge Co.*, 197 NLRB 1011 n.3 (1972) (dissent of Chairman Miller: supervisor's request to see copies of union literature was part of lawful campaign).

<sup>46</sup> Counsel cites *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

<sup>47</sup> Counsel rely on *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (statements such as "watch out" are illegal, implied threats).

careful and, even if she did, there is nothing to tie this to his union activity.

### 3. Analysis

I credit Forrest's testimony. He was a firm, extremely thoughtful witness. Accordingly, I find that Barnes accused him of damaging Respondent's property and told him to be careful all in the middle of his distribution of Union literature. Barnes did not know whether there had been damage to any hospital property at the time of her admonition to Forrest. Moreover, when Forrest examined the allegedly damaged property, he could discern no damage.

#### *L. Alleged interrogation by Tierno on or about July 2, 1998*

##### 1. Facts

Heang Happy Botelho, dietary nutrition technician, spoke with Michael Tierno, Director, Nutrition Services, on July 2, 1998, in his office. No one else was present. According to Botelho, Tierno asked Botelho if she had anything to tell him and she responded negatively. Tierno asked Botelho if she had read the July 2, 1998, letter to associates from Henrietta Wynne. In the letter, Wynne stated that she had worked in a Union environment for 18 years and, in her view, the only employees who needed a Union were the ones who worked as little as possible and took little pride in their work. Botelho responded no, she did not have time. Tierno read the letter out loud to her.

Tierno stated that he did not want to lose Botelho because she was a good worker. Botelho asked Tierno why he thought he was losing her. Tierno responded by handing Botelho a piece of paper and told her to write down any information about the Union. Botelho protested that she did not have any information about the Union. Tierno stated that Botelho had changed in the past 6 to 8 months. Botelho protested that she was still the same hard worker and asked Tierno if she had done something wrong. Tierno stated that she had not.

Although Tierno admitted that he knew Botelho supported the Union and that he met with her on several occasions in his office, Tierno testified that he never read a flyer to Botelho about the Union and he did not give her a pencil and paper and ask her to report on the Union. Tierno testified that he absolutely did not ask Botelho to give him information about the Union. Tierno recalled a conversation in late August in which he told Botelho he was afraid of losing her because her attitude was changing and she was making false statements. As to a conversation in early July, Tierno recalled Botelho initiating a meeting with him in order to lodge a complaint about her supervisor. There was no mention of the Union in this meeting.

##### 2. Contentions

Counsel for the General Counsel asserts that based on inherent probability and Respondent's pervasive anti-Union sentiments and its disparate treatment of Botelho on a subsequent occasion, Botelho's testimony should be credited and, accordingly, interrogation of Botelho by Tierno should be found in violation of the Act. Counsel for the Charging Party views the violation of the Act as solicitation of Botelho to campaign against the Union by writing an anti-Union statement for distri-

bution.<sup>48</sup> Counsel for Respondent asserts that Tierno was the more credible of the two witnesses. Counsel point to inconsistencies in Botelho's testimony<sup>49</sup> and argues that Tierno's testimony, on the other hand, was entirely consistent.

### 3. Analysis

Botelho was a strong witness who displayed an almost vehement recollection of events. She remained consistent in her recollection throughout cross examination. I credit Botelho and find that Tierno indeed asked Botelho what she knew about the Union.

#### *M. Alleged interrogation by Bernardi on or about August 31, 1998*

##### 1. Facts

On Monday, August 31, 1998, Botelho met with Bernardi, Director, Human Resources, around 12:30 p.m. Tierno and Veronica Galan, Human Resources Coordinator, were also present. Botelho complained about harassment by a co-worker in the cafeteria. Botelho gave Bernardi a letter explaining what had happened. Botelho had been in the cafeteria waiting to meet with a Union representative during her lunch. When the Union representative entered, a co-worker, George, yelled out, "Happy, the Union is here to see you." Botelho was embarrassed and complained to Tierno. In response, Bernardi asked Botelho if she had joined the Union yet. Botelho responded that she had not joined because she needed more information. Bernardi stated that they would have to meet the following day to discuss the harassment incident.

Later that day or the following day, Botelho met with Bernardi and Tierno in Tierno's office. Luis Carillo, Botelho's immediate supervisor, was also present. The meeting occurred around 2:30 p.m. Botelho stated that she needed the harassment in the cafeteria to stop. Bernardi asked Botelho if she had joined the Union yet. Botelho responded that she needed more information. Bernardi asked Botelho three more times during the meeting if Botelho had joined the Union.

Bernardi recalled participating in the meeting with Botelho and Tierno in her office. During the meeting, Happy repeated what had happened in the cafeteria, to wit: George was harassing her in front of her coworkers by announcing it in a loud voice that the Union was there to see her. Bernardi said she would conduct an investigation and meet with Bobby Bland, manager of security, as well as talking with George. Bernardi testified that she did not ask Botelho about the Union and how she felt about the Union nor whether she had joined the Union yet.

##### 2. Contentions

Counsel for the General Counsel and counsel for the Charging Party contend that Botelho should be credited over Ber-

<sup>48</sup> Counsel relies on *Medical Center of Ocean County*, 315 NLRB 1150, 1153 (1994) (employer violates Act by asking employee to campaign against union).

<sup>49</sup> For instance, counsel notes that Botelho initially stated that she was summoned to Tierno's office but later said she went to complain about her supervisor. Counsel also notes that Botelho initially stated that Tierno gave her a pencil but later said he gave her a pen.

nardi's denial and that under all the circumstances, the interrogation was coercive. Counsel for Respondent contends that credibility should be resolved in favor of Bernardi, pointing to Botelho's unbelievable assertion that Bernardi asked the same question three times in succession.

### 3. Analysis

It was clear that Botelho did not speak English with complete precision. Her testimony that Bernardi asked the same question three times is suspect. Nevertheless, I credit her testimony that during the interview with three managers in Tierno's office, she was asked whether she had decided to support the Union. I find under all the circumstances that this questioning was coercive.

### CONCLUSIONS OF LAW

By counseling Carmen Bautista and Caroline Plaza and by warning Carmen Bautista, Victor Rios, and Jaime Duarte because these employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

By enforcing its no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions while not enforcing the rule against nonunion solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By interrogating employees about their Union or protected, concerted activities, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By creating the impression of surveillance by informing employees that it knew who had attended Union meetings, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By telling an employee that the employee would be discharged if there were a strike, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By threatening an employee with an unspecified reprisal for engaging in union activity, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By requesting employees to report lawful and permissible union activity to it, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By demanding that employees surrender Union literature to it, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

By falsely accusing a Union supporter of damaging its property and threatening him with unspecified reprisals, Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>50</sup>

### ORDER

The Respondent, St. Francis Medical Center, Catholic Healthcare West, Southern California Region, Lynwood, California, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Counseling Carmen Bautista and Caroline Plaza and warning Carmen Bautista, Victor Rios, and Jaime Duarte because these employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Enforcing its no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions while not enforcing the rule against nonunion solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics.

Interrogating employees about their Union or protected, concerted activities.

Creating the impression of surveillance by informing employees that it knew who had attended Union meetings.

Telling an employee that the employee would be discharged if there were a strike.

Threatening an employee with an unspecified reprisal for engaging in union activity.

Requesting employees to report lawful and permissible union activity to it.

Demanding that employees surrender Union literature to it.

Falsely accusing a Union supporter of damaging its property and threatening him with unspecified reprisals.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of this Order, remove from its files any reference to the unlawful counselings and warnings of Carmen Bautista, Victor Rios, Jaime Duarte, and Caroline Plaza, and within 3 days thereafter notify the employees in writing that this has been done and that the counselings and warnings will not be used against them in any way.

Within 14 days after service by the Region, post at its facility in Lynwood, California copies of the attached notice marked

<sup>50</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

“Appendix.”<sup>51</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1998

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, December 15, 2000

#### APPENDIX

##### NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

<sup>51</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

To choose not to engage in any of these protected concerted activities.

WE WILL NOT counsel you, warn you, or otherwise discriminate against any of you for supporting Service Employees International Union, Local 399, AFL-CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT enforce our no-solicitation, no-distribution rule selectively and disparately by prohibiting union solicitations and distributions while not enforcing the rule against nonunion solicitations and distributions and by prohibiting employees from speaking about the Union during working time while not prohibiting conversations about nonunion topics during working time.

WE WILL NOT create the impression that we are spying on union activities by telling employees that we know who had attended Union meetings.

WE WILL NOT tell an employee that the employee will be discharged if there were a strike.

WE WILL NOT threaten an employee with an unspecified reprisal for engaging in union activity.

WE WILL NOT request that employees report lawful and permissible union activity to us.

WE WILL NOT demand that employees surrender Union literature to us.

WE WILL NOT falsely accuse a Union supporter of damaging our property and threaten him with unspecified reprisals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful counselings and warnings of Carmen Bautista, Victor Rios, Jaime Duarte, and Caroline Plaza, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the counselings and warnings will not be used against them in any way.

ST. FRANCIS MEDICAL CENTER, CATHOLIC  
HEALTHCARE WEST, SOUTHERN CALIFORNIA REGION